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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-680

RONALD R. HUTCHINSON,
Petitioner,

vs.

WILLIAM PROXMIRE and MORTON SCHWARTZ,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONER

MICHAEL E. CAVANAUGH
DAVID E.S. MARVIN
FRASER TREBILCOCK DAVIS & FOSTER
1018 Michigan National Tower
Lansing, Michigan 48933
Telephone 517-372-0235
Counsel for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 579 F2d 1027 (1978) and the opinion of the United States District Court for the Western District of Wisconsin is reported at 431 FSupp 1311 (1977).

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on June 30, 1978. A timely Petition for Rehearing En Banc was filed on July 14, 1978 and was denied on July 26, 1978. A timely Petition for Certiorari was filed on October 20, 1978 and Certiorari was granted on January 8, 1979. This Court's jurisdiction is invoked under 28 USC §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Speech or Debate Clause of Article I, Section 6 of the Constitution of the United States:

> "The Senators and Representatives . . . for any Speech or Debate in either House . . . shall not be questioned in any other Place."

The First Amendment to the Constitution of the United States:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

QUESTIONS PRESENTED

1. Are the press releases and newsletters of a member of Congress entitled to absolute immunity under the Speech or Debate Clause of the United States Constitution?

2. Does a research scientist who has not voluntarily thrust himself into the vortex of any important public controversy become a "public figure" within the meaning of *Gertz* v. *Welch*, 418 US 323 (1974), merely because his work is publicly funded, his scientific articles are printed in obscure technical publications, his name occasionally appears in a small local newspaper and his initial reply to a Senator's attack is partially quoted in some of the newspaper articles reporting the attack?

3. Does a defendant's pattern of malicious defamation coupled with his awareness of the truth and his admitted knowledge of the falsity of some of his statements create a genuine issue of material fact regarding the defendant's malice?

STATEMENT OF THE CASE

This is a civil action by a research scientist (Dr. Ronald R. Hutchinson) against a United States Senator (William Proxmire) and one of the Senator's administrative aides (Morton Schwartz), seeking damages for slander, libel, interference with contractual relations, invasion of privacy and intentional infliction of mental distress. The basis for federal jurisdiction is diversity of citizenship. As explained below, this suit involves a series of allegedly tortious statements made by the Senator and his aide in the context of several telephone calls, a press release, various press conferences, two newsletters, at least two television appearances and at least one radio broadcast.

The Plaintiff in this proceeding, and the Petitioner herein, is Dr. Ronald R. Hutchinson, a research scientist holding several academic degrees including a Ph.D. in experimental psychology from Yale University. Much of Dr. Hutchinson's professional career has been devoted to the study of aggression in humans and animals, including empirical research into possible techniques for quantitatively measuring latent stress and anger. (A. 282-85). To a large extent, this research has been facilitated through grants or contracts from various governmental agencies. (A. 285-87). It was on the basis of this funding that Dr. Hutchinson first came into contact with the Respondents.

In March of 1975, Respondent Proxmire launched a series of monthly press releases which he labeled "Golden

Fleece of the Month Awards". (P. 28).[1] Laden with caustic ridicule, sarcasm, and sardonic wit, these press releases were allegedly designed to attract nationwide attention to "the biggest or most ridiculous or most ironic example of government waste" which Proxmire could find each month. (A. 168). In fact, the press releases typically took one small portion of a research project out of context, distorted it and then claimed that the entire research grant was spent on that one isolated part. (A. 255-82, 287-99).[2] In connection with this monthly publicity program, Proxmire assigned his aide, Defendant Schwartz, to hunt for likely targets for the "Fleece". (P. 28; Proxmire Depo., p. 16).

The record below details two of Proxmire's Golden Fleece targets, in addition to Dr. Hutchinson. The first target was a social scientist, Dr. Elaine Walster of the University of Wisconsin - Madison. Professor Walster was contacted by telephone on March 13 or 14, 1975 by one of Proxmire's aides regarding a research project which she was conducting under a grant from the National Science Foundation. (A. 261, 276). Her research involved a complex application of "The Equity Theory" to give different categories of social relationships in search of answers to such questions as why some victims of unfair treatment respond with anger, while others passively accept their fate and still others blame themselves for their condition. (A. 261-62, 276). Because of the difficulties

1. References to "P" refer to the Petition for Writ of Certiorari, where the opinions of the lower courts are printed.

2. Proxmire's press releases never mention that the research projects have already been reviewed by a panel of independent scientists for the various federal agencies and that the projects must receive the highest ratings from these research scientists in order to receive initial and continued funding. (A. 279-80). Proxmire's attacks are harmful not only to the individual scientists involved, but they threaten basic research and the freedom of scientific inquiry. See the comments of former University of Wisconsin Chancellor William H. Sewell (A. 270-74), and the affidavit of B. F. Skinner. (A. 276-78).

in accurately communicating the details and thrust of several years of research over the telephone, it was agreed that the Professor would send Proxmire's aide a written summary of her work. (A. 262, 276). In addition, Professor Walster advised the aide that he could learn more about the research by consulting the National Science Foundation Progress Reports. (*Id.*).

On March 15, 1975, Professor Walster sent the summary of her research to Proxmire's office. (*Id.*). However, rather than wait for the factual report, Proxmire issued a press release on that same date (3/15/75) attacking and ridiculing Professor Walster's research. (A. 262, 268-69, 276). The press release characterized the Professor's research as a study of "passionate love" which addressed "erotic curiosity." (A. 268-69). The release also stated that the researchers had given caffeine tablets to students and then arranged "simulated dates" with members of the opposite sex. (*Id.*). These statements by Proxmire were false. (A. 263-66, 276). In fact, Professor Walster's grant did *not* involve a study of "passionate love," students were *not* given caffeine tablets and "simulated dates" were *not* conducted. (*Id.*).

Another social scientist whose work was misrepresented and belittled by Proxmire was Dr. Robert A. Baron of Purdue University. His research was motivated by the tragic riots which wracked many American cities during the "long hot summers" of the 1960's and the 1970's. (A. 256). Although heat was considered to be an important factor initiating the violence, no scientific studies had been conducted to actually determine the effect of heat on aggression. (*Id.*). Dr. Baron's research was designed to study this important behavioral issue. (*Id.*).

On or about March 16, 1976, Senator Proxmire issued a press release ridiculing Dr. Baron's research and award-

ing the "Golden Fleece" to the National Science Foundation for supposedly "spending $46,100 to study the effect of scantily clad women on the behavior of Chicago's male drivers." (A. 258-60). Contrary to Proxmire's misstatements, the $46,100 grant was actually used to support an extensive 2 1/2 year research project, the bulk of which involved laboratory studies to determine how excessive heat affects behavior, particularly a person's tendency to commit acts of aggression. (A. 256). The small portion of Dr. Baron's research which involved "male drivers" was intended to determine whether the findings obtained under controlled laboratory conditions could be verified under more natural circumstances. (*Id.*). Specifically, Dr. Baron and his staff observed and recorded the different emotional reactions of motorists driving air-conditioned cars as opposed to motorists driving non-air-conditioned cars on hot summer days. (A. 256-57). That portion of the overall project required less than three weeks and involved a total cost of less than $100. (A. 257). Thus, Proxmire's press release took a very small portion of Dr. Baron's 2 1/2 year project and presented it out of context, thereby giving the distorted impression that it represented the whole of Dr. Baron's study. Dr. Baron, like Professor Walster, was subjected to widespread, adverse publicity and ridicule as a result of the Respondents' erroneous press release. (*Id.*).

Still another social scientist whose work was misrepresented and ridiculed by Proxmire was Dr. Ronald R. Hutchinson, the Petitioner in the instant case. Respondent Schwartz, in the course of his search for "Fleece" victims, discovered that Dr. Hutchinson had received government funding for research which involved, among other things, experiments into the measurement of aggression by recording the biting attack behavior of laboratory monkeys under various conditions. (A. 282-85). Aware of Proxmire's bias

against social scientists (A. 77, 249), Schwartz decided to focus on Dr. Hutchinson's research as a possible subject for another monthly Fleece. (A. 180-81, P. 29).

As the investigation progressed, the Respondents received and reviewed numerous written statements from the funding agencies explaining Dr. Hutchinson's work. (A. 180-83, 189-91, 196-97, 199-201). The statement from the National Aeronautics and Space Administration (NASA), received and reviewed by Respondents prior to the issuance of the press release, included the following information:

"REASON FOR NASA SUPPORT
WORK BY DR. R. R. HUTCHINSON

"The National Aeronautics and Space Administration is sponsoring a program of research to develop improved selection and training methods for crews of space vehicles. This will be of particular importance in possible future long-duration manned space flight.

Since crews would be required to live and work together in confined spaces for long periods of time, it will be important to choose people who can work together effectively.

One of the first objectives of this project was to develop measurements of latent anger or aggression in order to measure the development of interpersonal hostility in normal people brought into the laboratory. It was demonstrated that at least one measure, jaw clenching, may be an appropriate indicator for this purpose. This technique records the electrical discharges from the jaw muscles (the masseters). With such recording, an indication of hostility is obtained apparently even when the person is unaware of any change in his attitude, and unaware that his jaw muscles have tightened." (A. 179-80).

NASA also informed the Respondents of certain specific uses for Dr. Hutchinson's research in connection with manned space missions. (*Id.*).

The Office of Naval Research (ONR) was another agency which, prior to the press release, furnished the Respondents with a detailed explanation of Dr. Hutchinson's work. One significant portion of the report contains the following conclusion:

> "This research has provided the Navy for the first time with an objective scientific testing system for measuring and examining aggressive behavior, and this permits, for example, an evaluation of specific effects of various pharmaceutical agents on these behaviors. Such information could well lead to procedures which would permit control and modification of aggressive behavior in situations where the behavior would be inappropriate and disruptive." (A. 178).

ONR also added a note concerning the cost of Dr. Hutchinson's research:

> "It should be noted that Dr. Hutchinson's work was supported by the Office of Naval Research over a six-year period at an average of $34,500 per year for all costs, including the use of animals and overhead. This is considered a moderate expenditure by the Navy for basic research." (*Id.*).

Another agency statement given to Proxmire and his staff prior to the press release explained the results of a thorough review of Dr. Hutchinson's work:

> "All reviewers recognize the value of Hutchinson's systematic, quantitative approach to an important research area that has often been plagued by subjective techniques. There was also general agreement that Hutchinson is a highly competent, hard-working, and productive investigator, and that his experiments are well designed and well executed." (A. 174).

In addition to reviewing these documents, Schwartz obtained further information concerning Dr. Hutchinson's research in the course of his telephone conversations with various agency officials. As Schwartz has admitted in sworn testimony, Dr. Woodward, project officer at ONR, defended Dr. Hutchinson's work and described it as "valid" (A. 205-06, 209) and Dr. Stollnitz, an official at the National Science Foundation (NSF), emphasized the merit of the research and told Schwartz that it was "sound". (A. 184-85).[3] In response to Dr. Stollnitz's supportive statements, Schwartz criticized the research and misrepresented R. Hutchinson's approval rate at the National Institute of Mental Health (NIMH).[4]

Notwithstanding the abundant and uncontroverted evidence that Dr. Hutchinson's research was "of particular importance" (A. 179), "well designed" (A. 174), "well executed" (*Id.*), "valid" (A. 209), "sound" (A. 206), and a "moderate expenditure" (A. 179), the Respondents drafted a caustic press release in anticipation of "fleecing" Dr. Hutchinson's work. (Proxmire Depo., p. 16; P. 30). The release contained several statements which Dr. Hutchinson contends were false and defamatory, including some statements the falsity of which has been admitted by the Respondents. (A. 201, 211, 226-27). For example, although

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3. Dr. Stollnitz also "pointed out that Senator Proxmire was concerned that the results of NSF research be applied to national problems, and here was a researcher who not only did the basic work but was willing to apply it in areas of concern to several Federal agencies." (A. 76).

4. Schwartz told Stollnitz that Dr. Hutchinson "had applied eight times to NIMH and had been turned down every time." (A. 72). In fact, at least three of Dr. Hutchinson's grant proposals had been approved by NIMH. (A. 302).

both Respondents admittedly knew the statement to be false, the press release charged that Dr. Hutchinson had personally received all of the research funds involved. (*Id.*; P. 84-86).[5] In similar fashion, the release charged that Dr. Hutchinson's projects had been "perhaps duplicative," even though the only information in the Respondents' possession which addressed the issue of possible duplication was a statement by Dr. Stollnitz of NSF that an agency study had compared Dr. Hutchinson's NSF and ONR projects and specifically found "no overlap." (A. 73).

The release also mischaracterized the nature of Dr. Hutchinson's research and ridiculed both the doctor and his work. (P. 65-67, A. 287-99). Focusing this ridicule on the fact that Dr. Hutchinson's experiments had involved measurements of jaw clenching as an indicator of latent aggression in laboratory monkeys, Proxmire accused Hutchinson of taking a "bite" out of the taxpayers, and he summarized seven full years of Dr. Hutchinson's scientific research as mere "monkey business" and "nonsense" which was "transparently worthless" and which had "made a monkey out of the American taxpayer." (P. 84-86).

After the proposed release was drafted, Schwartz called Dr. Hutchinson and read it to him. (A. 211-12, 247-49). Although Dr. Hutchinson vigorously objected to the release as inaccurate and misleading (A. 247), it was nevertheless submitted to the Senate Service Department on April 15, 1975 for release to 275 members of the news media, including CBS, NBC, ABC, the major wire services, major newspapers and magazines, and also such purveyors of the news as the *National Enquirer*. (A. 10-50, 166-67,

5. The press release stated, in part, that, "All of this money was given to Dr. Roland [sic] R. Hutchinson of Kalamazoo State Hospital in Michigan." (P. 66). Later in the release, the Respondents added, "In fact, the good doctor has made a fortune from his monkeys. . . ." (P. 67).

229). As a result, the release was widely distributed and received considerable attention across the nation. In addition to the written press release, Proxmire and Schwartz also made several oral statements to the press deriding Dr. Hutchinson and his research. (A. 167, 194-96, Proxmire Depo., pp. 39-40; Hutchinson Depo., p. 189).

Three days later, after the press release had already received nationwide publicity, Proxmire took a copy of substantially the same statement to the Senate and either handed it to the Clerk for insertion into the Congressional Record or read it on the Senate floor. (A. 220-21, 234-35). Proxmire is not certain which method he used for entering the press release into the Record, although he thinks he made a floor speech. (*Id.*).

Later, in May of 1975, Proxmire mailed a newsletter to approximately 100,000 people repeating the substance of his press release and further ridiculing Dr. Hutchinson and his work. (P. 87-88).

In addition to the foregoing statements, Proxmire also ridiculed Dr. Hutchinson on the Bob Barry radio program in Milwaukee (6/17/75) (A. 304-05), the nationally syndicated Mike Douglas television show (11/24/75) (Defendants' Trial Exhibit 6) and on at least one other television broadcast. (Ford Affidavit, Plaintiff's Trial Exhibit 8). During his appearance on the Mike Douglas show, Proxmire described the funding of Dr. Hutchinson's research as "terrible" and included it among "the most outrageous examples of wasteful extravagant stupid spending." (Defendants' Trial Exhibit 6).

During the time that Proxmire's various statements were being published throughout the country, his aide Morton Schwartz, was actively contacting the agencies which had supported Dr. Hutchinson's work and urging them to cut off funding. (A. 71-77, 90-94, 129-30, 184-86,

231). During several of these telephone calls, Schwartz misrepresented the facts concerning Dr. Hutchinson and his research. For example, he called Dr. Stollnitz at NSF and falsely stated that Dr. Hutchinson had been terminated from his research position for mismanagement of funds. (A. 91, Schwartz Depo., p. 107). He also called Dr. Krasnegor at the National Institute of Drug Abuse (NIDA) and falsely stated that "NSF, ONR and NASA were all dropping support of Dr. Hutchinson's work." (A. 130). In addition, Schwartz called Dr. Pollin at NIDA and reminded him that NIDA had not yet received a Golden Fleece. (A. 218, 242, 244). Although Schwartz contends that this "reminder" was merely a joke (A. 218), Dr. Hutchinson contends that it constituted an implicit threat. (A. 242, 244). During at least one of his agency calls Schwartz was, by his own admission, "hostile," "upset" and "angry." (A. 186).

Finally, in February of 1976, the Respondents issued a second newsletter of relevance to this case. (A. 168-73). The newsletter was entitled "Did the Golden Fleece Get Results?" and mentioned several projects which Proxmire had "fleeced." (*Id.*) Under the heading "Successes," Proxmire claimed credit for cutting off Dr. Hutchinson's funding and stopping his research as follows:

> "All the studies on why monkeys clench their jaws were dropped. No more monkey business." (A. 171).

It is Dr. Hutchinson's contention that the above-described conduct caused severe injury to his reputation, physical illness, mental distress, and substantial loss of existing and prospective economic advantage. To seek redress, he filed a Complaint in the United States District Court for the Western District of Wisconsin on April 16, 1976. Shortly thereafter, the Senate passed a resolution authorizing full payment out of the Senate contingent fund for all of Proxmire's expenses in connection with Dr. Hutchinson's suit. (Plaintiff's Trial Exhibit 45).

After the presiding judge in the Western District of Wisconsin disqualified himself, Judge Leighton of the Northern District of Illinois was designated to hear the case and the parties began filing numerous motions concerning jurisdiction, venue, extensions of time, amendment to pleadings, answers to interrogatories and production of documents. With respect to the issues currently under review, however, the only relevant motion was the motion filed by Respondent Proxmire on July 6, 1976 demanding dismissal or, in the alternative, summary judgment. This motion was based on claims of an absolute privilege under the Speech or Debate Clause (US Const, Art I, §6), a qualified privilege under the First Amendment, and the alleged absence of any genuine issue of material fact justifying a trial on merits.

The issues raised by the motion were addressed by the parties in detailed briefs supported by a total of 204 exhibits. After these documents were filed, the Trial Judge issued an Order on December 23, 1976 announcing that he intended to grant summary judgment in favor of Proxmire, but explaining that he would not enter a final order until a memorandum opinion had been filed. (A. 315-16). Then, on January 27, 1977, the Trial Judge ordered that the time for filing his memorandum be extended. (A. 316-17). The anticipated memorandum opinion was eventually issued on April 22, 1977 along with a "Ruling on Motion for Summary Judgment" stating that summary judgment had been entered in favor of Proxmire. (P. 26-67, A. 317-18). Although the opinion was not entirely clear, the trial court apparently ruled that all of Proxmire's conduct was privileged under the Speech or Debate Clause, the First Amendment and state law and also that there was no genuine issue of material fact justifying a trial on the merits. (P. 26-67). Dr. Hutchinson then filed a timely notice of appeal and Cause No. 77-

1677 was docketed in the United States Court of Appeals for the Seventh Circuit.

With respect to the Co-Defendant (Morton Schwartz) who had not joined in the original motion for summary judgment, the trial court served notice that the suit against the Senator's aide would be dismissed on the court's initiative unless Dr. Hutchinson made a showing within 30 days that such dismissal should not be ordered. (P. 64). Accordingly, the parties filed various briefs and several new exhibits and, on June 22, 1977, the Trial Judge issued a "Minute Order" dismissing the suit against Schwartz. (A. 318-19). No explanatory opinion was filed with the "Minute Order" and, on July 7, 1977, the Clerk of the United States District Court for the Western District of Wisconsin entered a judgment dismissing the action. (A. 320).

Dr. Hutchinson then filed a second notice of appeal to cover the judgment regarding Defendant Schwartz, and the same was docketed in the Seventh Circuit as Cause No. 77-1755. On Dr. Hutchinson's motion, the two appeals were consolidated on July 29, 1977.

Following the appropriate briefing and oral argument, the Court of Appeals entered a judgment on June 30, 1978, affirming the summary judgment and dismissal granted by the District Court. (P. 68-88). The grounds for the Court of Appeals' decision, however, were somewhat different than those expressed in the District Court opinion. Specifically, the Court of Appeals extended Speech or Debate immunity only to the Respondents' press release and newsletters, and rejected the District Court's application of such immunity to the tortious statements made in the course of the Respondents' telephone calls, television appearances, radio broadcasts and other interviews. These latter statements, while unprivileged under

the Speech or Debate Clause, were held to be privileged under the doctrine of *New York Times* v. *Sullivan*, 376 US 254 (1964) because, according to the Seventh Circuit, Dr. Hutchinson was a public figure and the Respondents had acted without malice.[6]

Doctor Hutchinson was deemed to be a public figure because his research was publicly funded, he had authored some scientific articles in obscure technical publications, his name had occasionally appeared in a small local newspaper and his initial response to Proxmire's press release was partially quoted in some of the newspaper articles reporting the attack. (P. 80-81).

On the issue of malice, the Court of Appeals acknowledged that at least some of the Respondents' statements may have been false and defamatory, but held the Respondents to be immune from liability.[7] The Court based its grant of immunity on evidence which it misread as indicating that the Respondents were unaware of the actual or probable falsity of their statements. (P. 82-83). The Court never specifically addressed the evidence concerning the Respondents' established pattern of malicious defamation (A. 255-76) or the deposition testimony wherein the Respondents admitted having prior knowledge of the falsity of some of their statements. (A. 201, 211, 226-27).

After a Petition for Rehearing En Banc was denied on July 26, 1978, Dr. Hutchinson filed a timely Petition for Writ of Certiorari which was granted by this Court on January 8, 1979.

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6. Having decided that Dr. Hutchinson was a public figure, the Seventh Circuit did not reach the issue of whether Dr. Hutchinson was a public official. (P. 81, fn. 14).

7. While acknowledging that some of the Defendants' conduct may have constituted actionable defamation, the Court of Appeals never actually reached the underlying issues of state law, but instead based its decision on the Speech or Debate and First Amendment privileges. (P. 82, fn. 15).

SUMMARY OF ARGUMENT

1. The Respondents' press release and newsletters are not entitled to absolute immunity under the Speech or Debate Clause of the United States Constitution because that Clause, as interpreted by this Court, protects only "legitimate *legislative* activity." This latter term has been strictly confined to those activities which are *necessary* to Congressional *deliberations* (i.e., voting, floor speeches, committee reports and official hearings). Many other Congressional activities such as press releases and newsletters may be entirely legitimate, but they are not legislative in character and thus are not entitled to absolute immunity under the Speech or Debate Clause.

2. None of the Respondents' statements are entitled to a qualified privilege under the doctrine of *New York Times* v. *Sullivan*, 376 US 254 (1964). The "actual malice" standard does not apply here because the Petitioner is not a "public figure" as that term has been defined by this Court. Rather, Dr. Hutchinson is a typical government research scientist who has neither "assumed a role of especial prominence in the affairs of society" nor "thrust himself to the forefront of a particular public controversy in order to influence the resolution of the issues involved." *Gertz* v. *Robert Welch Inc.*, 418 US 323, 345 (1974). Dr. Hutchinson should not be treated as a public figure merely because this research was publicly funded, his scientific articles were printed in obscure technical publications, his name occasionally appeared in a small local newspaper and his initial reply to the Respondents' press release was partially quoted in some of the newspaper articles reporting the Respondents' attack.

3. Even if he were deemed to be a public figure, Dr. Hutchinson would still have a cause of action because

the Respondents published their statements with knowledge of their falsity or reckless disregard of the truth. In support of this contention Dr. Hutchinson cites the Respondents' awareness of the truth prior to the date of publication, plus the Respondents' established pattern of malicious defamation of social scientists and the Respondents' admitted knowledge of the falsity of some of their statements.

ARGUMENT

I. The Respondents' Press Release and Newsletters Are Not Entitled to Absolute Immunity Under the Speech or Debate Clause.

One of the principal issues facing this Court concerns the applicability of Speech or Debate immunity to the Respondents' statements. The Speech or Debate Clause, US Const Art I, Sec 6, creates an absolute privilege which immunizes United States Senators and Representatives from liability for statements made in the course of their deliberations as legislators. An analysis of the applicable precedent defining the scope of this immunity reveals a definite emphasis on the legislative-deliberative character of the activities to be protected. It has been uniformly held that Speech or Debate immunity applies only to those activities which may be classified as "legitimate legislative activities." *Gravel* v. *United States*, 408 US 606 (1972); *United States* v. *Brewster*, 408 US 501 (1972); *Tenney* v. *Brandhove*, 341 US 367 (1951).

It may be anticipated that the Respondents will follow the pattern of their previous Briefs and cite numerous authorities for the proposition that legitimate legislative activity is entitled to absolute Speech or Debate immunity.

This point, however, is tautological and plainly begs the question since the term "legitimate legislative activity" was created for the express purpose of defining the limited class of activities which are entitled to immunity under the Speech or Debate Clause. The issue is not whether legitimate legislative activity is immune, but whether the Respondents' conduct constitutes legitimate legislative activity.

In construing the term "legitimate legislative activity," this Court has repeatedly emphasized that Congressional conduct is not immune merely because it is related to the legislative process:

> "We would not think it sound or wise, simply out of an abundance of caution to doubly insure legislative independence, to extend the privilege beyond its intended scope, its literal language and its history, to include all things in any way related to the legislative process. Given such a sweeping reading, we have no doubt that there are few activities in which a legislator engages that he would be unable somehow to 'relate' to the legislative process." *United States* v. *Brewster,* 408 US 501, 516 (1972).

To be deemed "legitimate legislative activity," conduct must be *necessary to Congressional deliberations*:

> "[T]he courts have extended the privilege to matters beyond pure Speech or Debate in either house, 'only when necessary to prevent indirect impairment of such deliberation.' *United States* v. *Doe,* 455 F2d at 760." *Gravel* v. *United States,* 408 US 606, 625 (1972).

This limited category of deliberative activity has been held to include official resolutions, committee reports, voting and, of course, actual speeches and debates on the

floor of Congress. *Kilbourn* v. *Thompson,* 103 US 168 (1881); *Powell* v. *McCormack,* 395 US 486 (1969); *Cochran* v. *Couzens,* 42 F2d 788 (DC Cir. 1930); *Tenney* v. *Brandhove,* 341 US 367 (1951); *Gravel* v. *United States,* 408 US 606 (1972); *Doe* v. *McMillan,* 412 US 306 (1973). Many other Congressional activities, while entirely legitimate, are nevertheless not sufficiently legislative in character to be immune from normal legal constraints. *United States* v. *Brewster, supra,* at 512. The standard for applying the Speech or Debate Clause is neither mere legitimacy nor relationship to legislative activity, but the actual deliberative nature of the conduct itself:

> "Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, *they must be an integral part of the deliberative and communicative processes* by which members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Gravel* v. *United States, supra,* at 625. (Emphasis added).

Even if the initial publication of a particular statement is necessary to Congressional deliberations and therefore privileged, the initial immunity will not be extended to cover subsequent republications of that same statement outside the deliberative process:

> "Nor does the Speech or Debate Clause protect a private republication of documents introduced and made private at a committee hearing, although the hearing was unquestionably part of the legislative process." *Doe* v. *McMillan,* 412 US 306, 314 (1973).

To apply these principles to the Respondents' conduct in the instant case,[8] it becomes necessary to determine whether the defamatory statements issued by the Respondents were necessary to Congressional deliberations and, if so, whether the high level of outside republication was required to serve Congressional needs. In deciding these issues, it is, of course, crucial to bear in mind the precise factual context of the instant case. First, it must be stressed that Dr. Hutchinson is *not* challenging the insertion of Respondent Proxmire's defamatory press release into the *Congressional Record,* nor is he challenging any committee hearings, voting or other clearly legislative activities. Dr. Hutchinson's complaint is limited to the Respondents' publicity releases, press interviews, political newsletters, defamatory phone calls, and appearances on television and radio talk shows.

Another fact which should be emphasized is that this case does not involve the limited distribution of an official Congressional document to a few government agencies and law libraries, but rather the widespread distribution of sarcastic personal publicity statements to virtually every major TV and radio network, wire service, newspaper and magazine in the nation. Moreover, the extensive press coverage in the instant case did not arise as the spontaneous aftermath of a legislative floor speech, but resulted instead from an orchestrated media campaign which began with a publicity release drafted and published as part of a continuing monthly series of similar press releases. Only later was the publicity statement inserted into the *Congressional Record* in the guise of a floor speech. Even after that point, Proxmire continued to republish his statements in further interviews and on entertainment-oriented TV and radio shows. Although it may be entirely legitimate for a Senator to seek such personal publicity, it is Dr. Hutchinson's contention that such non-legislative activities outside of Congress should be subjected to the same legal constraints that apply to every other person in this country.

8. In the instant case, the Court of Appeals has correctly viewed the immunity available to Senator Proxmire and his aide, Morton Schwartz, to be identical in scope. As noted by this Court, "for the purpose of construing the privilege, a member and his aide are to be treated as one." *Gravel* v. *United States, supra,* at 617, citing *United States* v. *Doe,* 455 F2d 760, at 761.

In analyzing the Speech or Debate issue in the instant case, the Court of Appeals divided the Respondents' conduct into four categories, as follows:

(1) The phone calls to various funding agencies encouraging them to terminate the Petitioner's research grants.

(2) The press release of April 18, 1975, criticizing the Petitioner's research.

(3) The two newsletters which Proxmire sent to his constituents announcing, first, that he had awarded a "Golden Fleece" to the agencies which funded Dr. Hutchinson's research and, later, that he had succeeded in cutting off Dr. Hutchinson's funding.

(4) The television, radio and other interviews wherein the Respondents discussed Dr. Hutchinson's research.

With respect to the telephone calls encouraging certain administrative agencies to terminate Dr. Hutchinson's research grants, the Court of Appeals noted the following statement from this Court's opinion in *Gravel* v. *United States*:

> "Members of Congress are constantly in touch with the Executive Branch of the Government and with administrative agencies—they may cajole and exhort

with respect to the administration of a federal state—but such conduct, though generally done, is not protected legislative activity." 408 US at 625.

Given the clear applicability of the preceding statement to the facts of the instant case, the Court of Appeals wisely decided that the Respondents' defamatory phone calls were not part of the deliberative legislative process and thus, not entitled to absolute immunity under the Speech or Debate Clause. Similarly, the court below recognized the non-legislative character of the Respondents' television, radio and other interviews and correctly ruled that these political matters did not enjoy total immunity from all legal constraints.

With respect to the Respondents' publicity release and so-called "newsletters," the inapplicability of the Speech or Debate privilege should have been equally clear, but the Court of Appeals decided to the contrary. Thus, the Court of Appeals' decision directly conflicts with the following statement of Mr. Chief Justice Burger, speaking for a majority of this Court in *United States* v. *Brewster*:

> "It is well known, of course, that Members of the Congress engage in many activities other than the purely legislative activities protected by the Speech or Debate Clause. These include a wide range of legitimate 'errands' performed for constituents, the making of appointments with government agencies, assistance in securing government contracts, preparing so-called *'newsletters'* to constituents, *news releases*, speeches delivered outside the Congress. The range of these related activities has grown over the years. They are performed in part because they have come to be expected by constituents and because they are a means of developing continuing support for future elections. *Although these are entirely legitimate activities, they are political in nature rather than legislative,* in the sense that term has been used by the Court in prior cases. But it has never been seriously contended that these political matters, however appropriate, have the protection afforded by the Speech or Debate Clause." *United States* v. *Brewster, supra,* at 512. (Emphasis added).

The inconsistency between the above-cited language and the decision below is obvious; this Court's opinion in *Brewster* specifically stated that newsletters and press releases are *not* entitled to absolute immunity under the Speech or Debate Clause, whereas the Court of Appeals in the instant case has specifically held that these political publications *are* entitled to such immunity.

Ironically, the above-quoted language from *Brewster,* which the Court of Appeals implicitly rejected in extending the Speech or Debate privilege to the Respondents' press release and newsletters, is exactly the same passage which the Court of Appeals cited in support of its ruling that the Respondents' television, radio and other interviews were outside the scope of the Speech or Debate Clause. Consequently, the Court of Appeals' decision appears to be internally inconsistent and likely to cause confusion among the lower courts unless corrected by this court.

In addition to its internal inconsistency and its conflict with the language of the *Brewster* decision, the Court of Appeals' decision also suffers from several other serious defects. One of the most obvious errors may be found at the end of the section wherein the Court extended Speech or Debate immunity to the Respondents' press release. The Court began its analysis by correctly citing *Doe* v. *McMillan, supra,* for the proposition that the so-called "informing function" of Congress does not afford the members of Congress with absolute immunity to dis-

tribute actionable material to the public at large. This initial statement was undeniably correct and fully in accord with the following statement from *Doe* v. *McMillan*:

> "[W]e cannot accept the proposition that in order to perform its legislative function Congress not only must at times consider and use actionable material but also must be free to disseminate it to the public at large, no matter how injurious to public reputation that material might be." *Doe* v. *McMillan, supra,* at 316.

The lower court was similarly correct in citing *Doe* for the rule that the distribution of information outside of Congress is not entitled to absolute immunity unless it is necessary to serve the "legitimate legislative needs" of the Congress. *Doe, supra* at 324. Based on the preceding citations, as well as the subsequent decision in *Doe* v. *McMillan* on appeal after remand, 566 F2d 713 (DC Cir. 1977) cert. denied 98 SCt 1607 (1978), the court below properly concluded that Speech or Debate immunity could not be extended to the Respondents' press release unless it was deemed to be a "limited distribution" of information.

At that point in its analysis, however, the Court of Appeals committed gross error by characterizing the widespread distribution of the Respondents' publicity release as a "limited facilitation of press coverage" entitled to absolute Speech or Debate immunity. Under the facts of this case, it is difficult to imagine how any court could ever conclude that the Respondents' press coverage was "limited." It is undisputed that the Respondents' publicity release was submitted to 275 members of the news media, including CBS, NBC, ABC, all of the major wire services, numerous radio and television stations, virtually all of the major newspapers and magazines, and even the *National Enquirer*. (A. 10-50). Also included on the distribution list were several large newspaper syndicates such as The Gannett News Service (A. 39), The Field Newspaper Syndicate (A. 40), Hearst News Services (A. 39), Knight Newspapers (A. 36), The Chicago Sun Times Syndicate (A. 47), The National Feature Syndicate (A. 32), The Washington Star Syndicate (A. 19), Scripps-Howard Publications (A. 25), and Cox Newspapers (A. 43), as well as other local and regional newspapers across the country, including The Washington Post (A. 20), The New York Times (A. 29), The Wall Street Journal (A. 22), The Christion Science Monitor (A. 11), The St. Louis Globe-Democrat (A. 13), The Indianapolis News (A. 29), The Los Angeles Times (A. 34), The Houston Chronicle (A. 35), The Knoxville News-Sentinel (A. 36), The Des Moines Register (A. 41), The Detroit News (A. 41), The Chicago Tribune (A. 44), The Boston Globe (A. 47) and The Atlanta Constitution (A. 48). In fact, the widespread distribution of the Respondents' press release was not even limited to the United States media, but was sent to the British Broadcasting Corporation (BBC) (A. 46), the Canadian Broadcasting Corporation (CBC) (A. 44), the Mainichi Newspapers (A. 34), The Toronto Globe Mail (A. 24), The Vancouver Sun (A. 22) and three newspapers from London, England. (A. 35).

To refer to this comprehensive international media distribution as a "limited facilitation of press coverage" is to defy common sense, especially when the distribution of the press release is viewed in context with all of the Respondents' other republications of basically the same information in subsequent statements to the press and in political newsletters, radio interviews, phone conversations and television shows. Other than skywriting and billboards, the Respondents utilized virtually every conceivable means of mass communication in their attempt to draw international attention to their statements. Never-

theless, the court below has characterized the above-described media blitz as a "limited facilitation of press coverage" entitled to absolute immunity under the Speech or Debate Clause. Therefore, if the "limited distribution" test enunciated in *Doe* v. *McMillan, supra,* is to have any practical significance, the decision of the court below must be reversed.

In addition to the press release, the other publications afforded absolute immunity under the Court of Appeals' decision were the so-called newsletters which Proxmire mailed to his constituents. These "newsletters" might well be classified as a form of campaign literature designed to impress rather than inform the voters, but even if it is assumed that the purpose of these self-laudatory mass mailings was to inform the voters, the lower court's decision still fails to withstand constitutional muster.

In reaching its decision, the lower court seemed to be persuaded by two points. First, the subject matter and language of the newsletters were related to Proxmire's responsibilities as a member of the Senate Committee on Appropriations. Second, the court opined that, in the absense of absolute immunity for his newsletters, Proxmire would be effectively isolated from the people who elected him. Upon closer analysis, both of these points prove insufficient to warrant the application of total immunity.

The Court of Appeals' first reason for immunizing Proxmire's newsletters is contrary to the great weight of authority holding that activity within the aegis of the Speech or Debate Clause must be "necessary to prevent indirect impairment of [Congressional] deliberations." *Gravel* v. *United States, supra,* at 625. While newsletters may serve certain informational and political purposes, it can hardly be said that mass mailings to the voters back home are essential to Congressional deliberations.

Furthermore, the lower court's reliance on the subject matter of the newsletters stands in direct contravention of the well-established principle that Congressional activities do not become privileged merely because they are in some way related to the subject matter of the legislative process:

> "In no case has this Court ever treated the Clause as protecting all conduct *relating* to the legislative process. In every case thus far before this Court, the Speech or Debate Clause has been limited to an act which was clearly a part of the legislative process—the due functioning of the process." *United States* v. *Brewster, supra,* at 515-516.

The dispositive question is not whether the Respondents' statements were related to a general subject of legislative concern, but whether the statements were essential to the deliberations of Congress. It might be surmised that in this day and age, virtually everything is related in some way to federal spending. Legislators may not rely on these relationships, however, to free themselves from the legal constraints that govern the conduct of all other citizens. In *Gravel* v. *United States, supra,* for example, the subject matter of the "Pentagon Papers" was military affairs—a topic clearly within the scope of Congressional responsibility. Nevertheless, this Court wisely held that private publication of those "papers" was not entitled to Speech or Debate immunity:

> "Here, private publication by Senator Gravel through the cooperation of Beacon Press, was in no way essential to the deliberations of the Senate. . . . We cannot but conclude that the Senator's arrangements with Beacon Press were not part and parcel of the legislative process." 408 US at 625-626.

Thus, the court below has erred in granting absolute immunity to the Respondents' mass mailings based on the relationship between the subject matter of the newsletters and Proxmire's interest in public expenditures.

Similarly, the court has also erred in assuming that Proxmire will be isolated from his constituents unless all of his newsletters are cloaked in absolute immunity. Even in the absence of such immunity, Proxmire would not be forced into isolation, but would still be free to distribute mass mailings whenever he wished. The only effect of withholding immunity would be to subject his statements to the same laws which apply to all other citizens. It seems patently absurd to argue that a legislator who cannot lie to his constituents is thereby effectively isolated from them. This rationale would certainly not apply to the millions of private individuals, groups, corporations and associations who communicate very effectively without the privilege of absolute immunity.

Public corporations, for example, regularly send annual reports and other information to their shareholders without any special privileges under the Speech or Debate Clause. In fact, under the corporate and securities laws designed to protect the public interest, corporations are subject to severe penalties for the publication of misinformation in such reports. Certainly, if such strict regulations have not prevented corporations from sending mass mailings to their shareholders, it is illogical to assume that the mere absence of absolute immunity will prevent legislators from sending mass mailings to their constituents.

The unfounded nature of the Court of Appeals' assumption is further indicated by the fact that *state* legislators, unprotected by the federal Speech or Debate Clause, regularly send newsletters and other mass mailings to

their constituents. Consequently, it is logical to assume that politicians interested in serving the public (and/or being re-elected) will continue to send mass mailings to their constituents regardless of the ruling in this case. The most likely effect of a ruling granting immunity to newsletters would be to encourage the increased publication of misinformation and defamatory falsehoods, especially at election time when legislators have an obvious and substantial incentive to misrepresent their own records and to malign the reputations of their political opponents. In effect, the door would be opened to political character assassination with the simple proviso that all such attacks be printed in the form of newsletters.

In the absence of potential liability for defamation or other torts, there would be no effective legal deterrent against the intentional publication of falsehoods by members of Congress.[9] Furthermore, as knowledge of this absolute immunity became known to average citizens, it would be logical to expect that the public credibility of members of Congress would be substantially eroded. Thus, it would be directly contrary to public policy for this Court to accept the Court of Appeals' illogical assumptions and expand the limited scope of the Speech or Debate Clause to include Senator Proxmire's so-called newsletters. The public interest would be far better served by upholding the fundamental rule expressed in *Doe* v. *McMillan, supra,* as follows:

> "A member of Congress may not with impunity publish a libel from the Speaker's Stand in his home

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9. It must be borne in mind that, in addition to barring Dr. Hutchinson's claims for libel and slander, the lower court's extension of Speech or Debate immunity has also deprived the Petitioner of any remedy for the Respondents' interference with contractual relations, intentional infliction of emotional anguish and invasion of privacy.

district, and clearly the Speech or Debate Clause would not protect such an act even though the libel was read from an official committee report." 412 US at 314.

In summary, the Court of Appeals' decision to extend Speech or Debate immunity to the Respondents' press release and newsletters flies in the face of both public policy and the relevant decisions of this Court. The publications in question were not essential to Congressional deliberations, nor was their widespread distribution necessary to serve the legitimate needs of Congress. Consequently, the judgment below should be reversed.

II. The Respondents' Statements Are Not Entitled to a Qualified Privilege Under the First Amendment.

In the absence of absolute immunity under the Speech or Debate Clause, it is necessary to consider the possible applicability of a qualified privilege under the doctrine of *New York Times* v. *Sullivan*, 376 US 254 (1964). In the *New York Times* case, this Court interpreted the First and Fourteenth Amendments as requiring a qualified privilege for those who criticize the official conduct of "public officials". This new privilege was not absolute, but required defamed public officials to meet a more stringent burden of proof in order to recover for injuries to their reputations. Specifically, those victims of libel or slander who were deemed to be public officials were denied any remedy unless they could prove that the defendants had acted with "actual malice." As explained by this Court, the burden of proving "actual malice" could be satisfied by showing that the defamatory statement was published "with knowledge that it was false or with reckless disregard of whether it was false or not." 376 US at 280.

Three years after *New York Times*, the same actual malice standard was applied in a false light privacy action and extended to cover private individuals involved in matters of "public interest" as well as public officials. *Time, Inc.* v. *Hill*, 385 US 374 (1967). In the same year, the burden of showing "actual malice" was extended to "public figures" in the companion cases of *Curtis Publishing Company* v. *Butts* and *Associated Press* v. *Walker*, 388 US 130 (1967). Then, in *Rosenbloom* v. *Metromedia, Inc.*, 402 US 29 (1971), a plurality of this Court extended the *New York Times* doctrine even further by applying it to "all discussion and communication involving matters of public or general concern." 403 US at 44. In the subsequent case of *Gertz* v. *Robert Welch, Inc.*, 418 US 323 (1974), however, this Court repudiated the "general or public interest" test in libel and slander cases and cautioned that:

> "The extension of the *New York Times* test proposed by the *Rosenbloom* plurality would abridge [the] legitimate state interest [in compensating the victims of defamatory falsehood] to a degree that we find unacceptable." 418 US at 346.

With respect to tort claims other than libel and slander, the effect of *Gertz* was unclear. As recently explained in *Rinsley* v. *Brandt*, 446 FSupp 850 (1977):

> "The important question remaining to be answered . . . is whether *Gertz* or *Hill* applies in the privacy context for evaluating whether or not plaintiff must show malice in order to recover. There appears to be a considerable difference of opinion on the subject." 446 FSupp at 856.

One legal analyst noted that, "*Gertz* has been viewed as a threat to the continued validity of *Hill* as it relates

to private figures,[10] and concluded that, "its logic may compel transferral of the negligence standard into the privacy area."[11] Another analyst has explained the need for standards as follows:

> "Arguably, the *Gertz* rationale is applicable to privacy cases and the courts should take the next logical step by discrediting *Time, Inc.* v. *Hill.* In privacy suits it is entirely sensible to condition the limitation of liability upon the status of the plaintiff.
>
> . . .
>
> One needs to know whether *Time, Inc.* v. *Hill* is still conceptually valid [and] whether *Gertz* has any application to privacy actions. . . ."[12]

Because one of Dr. Hutchinson's claims against the Respondents is for invasion of privacy, this case presents an:

> ". . . opportunity to determine whether the *Gertz* shift away from public interest analysis in the libel area [should] be extended to the privacy area, thus overruling the *Hill* decision." *Rinsley, supra,* at 856.

Logic dictates that *Time* v. *Hill* was already implicitly dercut in *Gertz,* and thus this Court can resolve this issue by simply explicating the effect of its prior rulings.[13]

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10. Note, *Defamation, Privacy and the First Amendment,* 1976 *Duke Law Journal* 1016, at 1019 (1976).

11. *Id.,* at 1032.

12. Lehmann, *Triangulating the Limits on the Tort of Invasion of Privacy: The Development of the Remedy in Light of the Expansion of Constitutional Privilege,* 3 *Hastings Law Quarterly* 543, at 580 and 596 (1976).

13. Lehmann, *supra,* note 12 at 593; Note, *supra,* note 11; Hill, *Defamation and Privacy under the First Amendment,* 76 *Columbia Law Review* 1205, at 1274; Phillips, *Defamation, Invasion of Privacy and the Constitutional Standard of Care,* 16 *Santa Clara Law Review* 77, 99 (1975).

Under existing precedent, the standard of proof in defamation actions clearly depends on whether the victim is deemed to be a private individual or a public person (i.e., public figure or public official), and it appears that the same distinction also applies to other tort claims premised upon a defendant's statements. Thus, it is necessary to determine whether the Court of Appeals was correct in ruling that Dr. Hutchinson was a public figure.[14] As explained in the following subsection, a proper application of the relevant standards reveals that Dr. Hutchinson was actually a private individual when he was defamed.

(A) At the time he was defamed, Dr. Hutchinson was not a public figure within the meaning of *Gertz* v. *Welch.*

The term "public figure" has been defined by this Court as follows:

> "For the most part, those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment." *Gertz, supra,* at 345.

It may be noted from the preceding definition that there are actually two types of public figures—"all-purpose public figures" and "limited issue public figures."

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14. After ruling that Dr. Hutchinson was a public figure, the Court of Appeals specifically declined to review the District Court's decision that the Petitioner was also a public official.

This distinction is more clearly set forth in the following statement from the majority opinion in *Gertz*:

> "That designation [i.e., public figure] may rest on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions." *Gertz, supra,* at 351.

In the instant case, the Court of Appeals correctly observed that Dr. Hutchinson did not enjoy such "persuasive power and influence" or such "pervasive fame or notoriety" that he could be regarded as a public figure for all purposes. Based on essentially four separate factors, however, the Court of Appeals concluded that Dr. Hutchinson should be treated as a public figure "with regard to the propriety of his research." In the words of the Court of Appeals, these four factors were as follows:

1. "Dr. Hutchinson had actively solicited federal grants to pursue his research and had secured a substantial amount of public funds by his applications."
2. "The plaintiff had also published numerous articles regarding his work."
3. "Stories regarding his research had appeared several times in local papers."
4. "Dr. Hutchinson's answering press release was quoted in detail in the same stories which initially reported the Golden Fleece Award."

With respect to the first factor cited by the Court of Appeals, it is informative to note how little money Dr. Hutchinson personally received from the federal grants in question. During the four years from 1967 through 1970, for example, a total of less than $15,000 was involved. That amount represented reimbursements to Western Michigan's University to help defray the cost of Petitioner's summer salaries over the four years involved. From 1971 through 1975, the petitioner did not personally receive any federal research funds at all. All of the grants involved in the instant case were awarded to the State of Michigan and were administered by persons outside of Dr. Hutchinson's department. The money was dedicated exclusively to purchasing equipment and supplies and to paying the wages of researchers other than Dr. Hutchinson. In fact, during the period in question, the only public funds paid directly to the petitioner were contained in his salary as a State employee in the Michigan Civil Service. (A. 292-93, 299). Thus, it is inaccurate and misleading to characterize Dr. Hutchinson as the direct recipient of all of the research funds involved.

Even if the preceding facts are ignored, however, the mere fact that Dr. Hutchinson sought and obtained public funding for his research should not automatically convert him into a public figure. First, it should be readily apparent that a private individual does not "thrust" himself into any "public controversy" by simply submitting confidential grant applications in the context of established programs for government support of scientific research. Second, if the mere solicitation and acceptance of public funds becomes a dispositive criterion for defining limited issue public figures, then unduly large numbers of private citizens will be adversely affected. Civil Service employees, government contractors, students on scholarships and even welfare recipients would be effectively stripped of

the ability to protect their reputations, privacy and other related rights if their receipt of public funds elevated them to public figure status. As a result, many financial assistance programs designed to promote socially beneficial conduct such as scientific research might be impeded if the intended recipients declined to participate rather than sacrifice some of their civil rights and voluntarily expose themselves to an increased risk of injury from defamatory falsehoods.[15]

In addition to its practical disadvantages, a rule equating public funding with public figure status would signal a return to the rejected standard of *Rosenbloom* v. *Metromedia, supra.* As noted above, the plurality opinion in *Rosenbloom* extended the rigorous *New York Times* malice standard to "all discussion and communication involving matters of public or general concern." 403 US at 44. It might be persuasively argued that the *Rosenbloom* standard would have effectively extended the knowing-or-reckless falsity requirement to any recipient of public funds, regardless of the public or private status of the particular individual involved. The *Rosenbloom* standard, however, was repudiated by this Court in *Gertz* v. *Welch, supra,* and thus the public's general interest in the expenditure of government funds for scientific research is not a relevant criterion in determining whether an individual scientist was a public figure at the time he was defamed. Rather, it must be determined whether the scientist in question has "thrust himself to the forefront of a particular public controversy in order to influence the resolution of the issues involved," or has "invited attention and comment" or

15. An analogous danger was noted by Mr. Chief Justice Burger in his dissenting opinion in *Gertz, supra,* where he stated, "The important public policy which underlies . . . the right to counsel would be gravely jeopardized if every lawyer who takes an 'unpopular' case, civil or criminal, would automatically become fair game for irresponsible reporters and editors. . . ." 418 US at 355.

has "assumed special prominence in the resolution of public questions." *Gertz, supra,* at 345, 351. These are the only appropriate standards for determining whether an individual is a public figure.

In *Time* v. *Firestone,* 424 US 448 (1976), the preceding standards were applied to the wife of "the scion of one of America's wealthier industrial families" in the context of a highly publicized divorce action and this Court reached the following result:

> "Respondent [Mrs. Firestone] did not assume any role of especial prominence in the affairs of society, other than perhaps Palm Beach society, and she did not thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it.
>
> "Petitioner contends that because the Firestone divorce was characterized by the Florida Supreme Court as a 'cause célébre', it must have been a public controversy and respondent must be considered a public figure. But in so doing, petitioner seeks to equate 'public controversy' with all controversies of interest to the public. Were we to accept this reasoning, we would reinstate the doctrine advanced in the plurality opinion in *Rosenbloom* vs. *Metromedia, Inc.,* 403 US 29 (1971), which concluded that the *New York Times* privilege should be extended to falsehoods defamatory of private persons whenever the statements concern matters of general or public interest. In *Gertz,* however, the court repudiated this position, stating that 'extension of the *New York Times* test proposed by the *Rosenbloom* plurality would abridge [a] legitimate state interest to a degree that we find unacceptable.' 418 US at 346." 424 US at 453-54.

In the present case, the Court of Appeals attempted to distinguish *Time* v. *Firestone* on the ground that "Dr. Hutchinson was not forced to seek public funds." (P. 81, fn. 14). Although, in a purely theoretical sense, it may be true that Dr. Hutchinson was not "forced" to solicit public funds, it is equally true that Mrs. Firestone was not "forced" to file for her divorce. Thus, the lower court has raised a distinction without a difference. As a practical matter, the only realistic method by which Mrs. Firestone could terminate her marriage was through the process of divorce, just as the only realistic method by which Dr. Hutchinson could actively pursue his basic research was through the process of public funding. In neither case, did the Petitioners thrust themselves to the forefront of any particular controversies nor did they assume special prominence in the resolution of public questions. On the contrary, Mrs. Firestone merely followed the ordinary rules and procedures for terminating a marriage and Dr. Hutchinson merely followed the ordinary rules and procedures for submitting confidential grant applications.

The second factor upon which the Court of Appeals based its finding that Dr. Hutchinson was a public figure concerned the Petitioner's publication of a number of articles regarding his scientific research.[16] This factor, like the first, does not satisfy the standards enunciated in *Gertz* v. *Welch, supra.* In fact, it was specifically noted in *Gertz* that the Petitioner therein had "published several books and articles on legal subjects" and yet this Court held that it was "*plain* that Petitioner was *not* a public figure." *Gertz, supra,* at 351, 352. The Court of Appeals should have reached the same conclusion in the instant case where all of Dr. Hutchinson's publications were

16. The overwhelming majority of these articles were published jointly with one, two or three other co-authors.

printed in highly specialized periodicals or other esoteric publications of extremely limited circulation. For example, a majority of Dr. Hutchinson's published articles appeared in an obscure technical journal known as the *Journal of the Experimental Analysis of Behavior.* (Plaintiff's Trial Exhibits 68-96). Others were printed in publications such as the *Journal of Comparative and Physiological Psychology* (Plaintiff's Trial Exhibits 82, 85, 89) and *The Physiological Record.* (Plaintiff's Trial Exhibit 88). The titles of Dr. Hutchinson's works included "Electrographic Changes in the Amygedala and Hippocampus Associated with Biting Attacks" and "Conditioning of the Aggressive Behavior of Pigeons by a Fixed-Interval Schedule of Reinforcement." (Plaintiff's Trial Exhibits 71 and 81).

In addition to noting the limited scope of distribution and the esoteric content of the articles, it is also important to emphasize that these publications were designed to disseminate scientific information, not to espouse controversial views on matters of general public concern. Thus, Dr. Hutchinson's scientific publications did not thrust him into the vortex of an important public controversy, nor did they endow him with any special prominence in the resolution of public questions, as required by *Gertz.* Consequently, the court below has erred in considering these limited publications as evidence of Dr. Hutchinson's public figure status.

In addition to citing Dr. Hutchinson's public funding and obscure technical publications, the Court of Appeals also relied upon certain newspaper "stories" which allegedly "appeared several times in local papers." (P. 80). As an initial matter, it should be noted that the court's reference to "local papers" is inaccurate since, in fact, only one local paper, *The Kalamazoo Gazette,* had printed

any articles concerning Dr. Hutchinson's research prior to the issuance of the Respondents' press release. Moreover, only one of these local articles could be properly regarded as a "story." (A. 58-59). That one article simply described some of the research at the hospital where Dr. Hutchinson worked, and did not concern any public controversy over the funding of that work. (*Id.*). All of the remaining "stories" referenced by the Court of Appeals were actually one or two-paragraph announcements inconspicuously published in the back pages of the paper. (Defendants' Trial Exhibits 47-54). The true insignificance of these routine announcements is partially indicated by the substance of the text which surrounded each article. The announcement of January 21, 1973, for example, was flanked by the obituaries and the want ads (Defendants' Trial Exhibit 52) and the announcement of March 8, 1973 was accompanied by more obituaries, as well as a report on snowmobile conditions and various stock market quotations. (Defendants' Trial Exhibit 53). If, as the Court of Appeals has held, this type of limited press coverage is sufficient to elevate a private individual to the level of a public figure, then logic dictates that the rigorous standard of *New York Times* v. *Sullivan* must necessarily apply to every Eagle Scout, accident victim or club secretary whose name is ever printed in a local newspaper. Such a conclusion, although mandated by the Court of Appeals' decision in the instant case, is clearly contrary to the spirit and the letter of the standards previously enunciated by this Court. Therefore, the decision below should be reversed.

The final point which the court below cites as evidence of Dr. Hutchinson's public figure status is that "Dr. Hutchinson's answering press release was quoted in detail in the same stories which initially reported the Golden Fleece Award. (Plaintiff's Exhibits 32-39)." (P. 80-81).

Again, a point of clarification is in order. By referring to "the same stories," the lower court has implied that Dr. Hutchinson's response was quoted in all of the stories which initially reported the Respondents' press release. This implication is misleading because, in fact, some of the stories reporting the Golden Fleece Award, including those in *The Detroit News* and *The New York Times*, made no mention whatsoever of Dr. Hutchinson's response. (Plaintiff's Trial Exhibits 33, 37). This unequal press coverage is not surprising since Dr. Hutchinson did not have access to the 275 addresses on the Respondents' media distribution list. (A. 10-50).

Thus, it is more accurate to state that *portions* of Dr. Hutchinson's reply were printed in *some* of the newspaper articles which initially reported Proxmire's press release. According to the Court of Appeals, this fact supposedly indicates that Dr. Hutchinson had sufficient access to the media to "expose through discussion the falsehood and fallacies of the defamatory statements" concerning him. *Curtis Publishing Company* v. *Butts, supra,* at 155. In reaching this conclusion, however, the court below overlooked several significant points. First, the press coverage under discussion occurred *after* the issuance of the Respondents' press release. Since the issue is whether Dr. Hutchinson was a public figure prior to the issuance of the Respondents' press release, the appropriate focus should be on his status at that time, rather than at a date after his privacy had been invaded by an internationally distributed press release which specifically named him and ridiculed his work. The Respondents are not entitled to lift themselves by their bootstraps by making the Petitioner into a public figure in order to defame him with impunity.

Another point which the Court of Appeals overlooked was Dr. Hutchinson's access to the media following the

initial coverage of his first response. Although the Respondents continued to republish their statements in many different contexts, Dr. Hutchinson was unable to respond to these other defamatory statements on the Mike Douglas Show, the Bob Barry radio show, the agency telephone calls or in the so-called newsletters. This continuing inability to respond is a more accurate indication of Dr. Hutchinson's true access to the media. The initial news coverage afforded to Dr. Hutchinson's answering press release did not provide the Petitioner with an adequate "means of counter-argument to be able to expose through discussion the falsehood and fallacies of the defamatory statements" regarding him.

A final point overlooked by the Court of Appeals is that this initial coverage of Dr. Hutchinson's position did not occur as a result of Dr. Hutchinson's public status, but rather by virtue of the persuasive power and influence of the person making the defamatory statements. Indeed, it is logical to assume that at least token press coverage would be afforded to the response of any private individual who is specifically named and publicly defamed by a United States Senator in an internationally distributed press release. Consequently, if the Court of Appeals' analysis is accepted, virtually any private person who is defamed by a truly public figure might automatically become a public figure in his own right merely because his initial denial is mentioned by the press. Under the standards enunciated in *Gertz*, it should be readily apparent that this "bootstrap" approach to public figure analysis is wholly inappropriate.

From the foregoing analysis, it should be clear that Dr. Hutchinson was not a public figure at the time he was first defamed by the Respondents. At no point did he voluntarily relinquish any part of his interests in the

protection of his personal and professional reputations, his privacy, his contractual relationships or his other civil rights. He achieved no "special prominence in the resolution of public questions" merely because of his receipt of public funds, his publication of scientific articles, the mention of his name in obscure newspaper announcements and the limited press coverage of his initial denial. On the contrary, these four factors might well apply to every government research scientist in the country, along with large numbers of other private citizens in various occupations. They, like Dr. Hutchinson, are more vulnerable to injury than true public figures and therefore should be afforded the full protection of the law.

(B) Even if Dr. Hutchinson were deemed to be a public figure, there would be a genuine issue of material fact regarding the Respondents' malice.

Although the preceding subsection demonstrates that Dr. Hutchinson is a private individual unaffected by the "actual malice" standard of *New York Times* v. *Sullivan*, the following paragraphs reveal that, even if the Petitioner were treated as a public figure, he would not lose his cause of action because the record contains sufficient evidence to raise a genuine issue of material fact regarding the Respondents' malice.[17]

Before reviewing the relevant evidence, it is appropriate to cite a number of general legal principles which apply to the instant case. First, the issue of whether a particular defendant has acted maliciously in a given case is a material question of fact. *McGovern* v. *Martz*, 182

17. This analysis of the Respondents' malice may also be pertinent to Dr. Hutchinson's claim for invasion of privacy if this Court decides that *Time, Inc.* v. *Hill*, *supra* is still good law even after *Gertz*.

FSupp 343 (DDC, 1960). Also, on a motion for summary judgment, "the inferences to be drawn from the underlying facts contained in [the moving party's] materials must be viewed in the light most favorable to the party opposing the motion." *Adickes* v. *S. H. Kress & Company*, 398 US 144, 159 (1970), citing *United States* v. *Diebold, Inc.*, 369 US 654, 655 (1962). Strict adherence to this well-established rule is especially important in defamation cases because malice is a particularly inappropriate issue to decide on a motion for summary judgment. *Poller* v. *Columbia Broadcasting Company*, 368 US 464, 473 (1962); *Vandenburg* v. *Newsweek, Inc.*, 441 F2d 378 (5th Cir. 1971); *Empire Electronics Co.* v. *United States*, 311 F2d 175, 180 (2nd Cir. 1962); *Caldwell* v. *Crowell-Collier*, 161 F2d 333 (5th Cir. 1947). As explained by the Court in *Goldwater* v. *Ginzberg*, 261 FSupp 784 (1966):

> "The issue of actual malice on the part of defendants seems *peculiarly inappropriate for a disposition by summary judgment* because it concerns 'motive, intent, and subjective feelings and reactions.' *Empire Electronics Co.* v. *United States*, 311 F2d 175, 180 (2nd Cir., 1962); see also 6 Moore's Federal Practice (2d ed) 2581. The Supreme Court has cautioned against summary judgment 'where motive and intent play leading roles.' *Poller* v. *Columbia Broadcasting Co.*, 368 US 464, 473 (1962).
>
> "Moreover, since the questions deal with the state of mind [of the] defendants . . ., Plaintiffs ought to be able to have their testimony before the trier of fact in open court on cross-examination." (*Goldwater* v. *Ginzberg*, 261 FSupp at 788. (Emphasis added).

This same principle is expressed in the Advisory Committee notes to the Federal Summary Judgment Rule (FRCP 56):

> "Where an issue as to a material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility, summary judgment is not appropriate. Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented."

Similarly, in *Vandenburg* v. *Newsweek, Inc.*, 441 F2d 378 (5th Cir. 1971), the court affirmed the District Court's refusal to grant the defendant summary judgment in a defamation case because the defendant had failed to carry his burden of establishing that there was no genuine issue as to the fact of malice. The Court noted:

> "A statement is made with actual malice if made 'with knowledge that it was false or with reckless disregard of whether it was false or not.' *New York Times* vs. *Sullivan. Proof of such a mental state must usually be inferred from circumstances difficult to develop on motion for Summary Judgment.*" 441 F2d at 380 (Emphasis added)

When these accepted standards are applied to the facts of the instant case, it becomes clear that the summary judgment upheld by the Court of Appeals was erroneous and should be reversed. For example, in its analysis of the issue of malice, the court below did not even consider the evidence of the Respondents' consistent pattern of malicious defamation. It is important to recognize that the ridicule and misrepresentation of Dr. Hutchinson's research was not an isolated incident, but occurred as part of a regular monthly series of press releases designed to achieve maximum publicity at the expense of accuracy.

The press release attacking the research of Dr. Elaine Walster was similar in many respects to the release at-

tacking Dr. Hutchinson's work. Both releases attacked social scientists, both were laden with sarcastic ridicule, both contained factual misstatements and both showed a reckless disregard for the truth. In Professor Walster's case, one of Proxmire's aides contacted the Professor for the first time on or about March 14, 1975 to discuss her research. On the next day, however, even though Proxmire's aide knew that Professor Walster was sending him a written factual summary of her work, a caustic and defamatory press release was published attacking and ridiculing the Professor's research. The release referred to "simulated dated" research which had never been conducted and falsely characterized the scientist's work as a ridiculous study of "passionate love."

The Respondents' continuing series of publicity releases also attacked the research of other social scientists such as Dr. Robert A. Baron of Purdue University. Again, the pattern was clear. As with the releases attacking Dr. Walster and the Petitioner, the release concerning Dr. Baron's research derided his work, misrepresented the facts, and presented a very small portion of the research project out of context, thereby giving the distorted impression that it represented the entire study for which the grant was awarded. As explained in Dr. Baron's affidavit, the portion of his research which Proxmire cited as costing $46,100 actually involved a total cost of less than $100. (A. 256-57). Moreover, even that small portion of Dr. Baron's research was misrepresented in the Respondents' press release. (*Id.*).

The record also reveals that it was more than mere coincidence that several Fleece victims were social scientists. In fact, at least two sources indicate that Proxmire has a strong personal bias against the social sciences, which he considers "equivalent to alchemy." (A. 77, 248-

49). Although this bias does not prove "reckless disregard of the truth," it may explain the Respondents' established pattern of recklessly disregarding the truth in connection with Golden Fleece Awards attacking social scientists. In each case, the Respondents seemed less concerned with finding the facts than with finding a project which could be mischaracterized, distorted and ridiculed. Apparently, this overriding objective caused them to disregard the facts in their effort to make each succeeding press release even more humorous and attention-getting than the preceding releases.

The Respondents' disregard for the facts of Dr. Hutchinson's research is also readily apparent from the record below. For example, the Respondents were aware of, but chose to disregard, substantial evidence of the worth and scientific merit of Dr. Hutchinson's research. Prior to the issuance of the initial press release, Respondents received and reviewed several written statements from various funding agencies explaining the specific value of Dr. Hutchinson's work.[18] NASA informed the Respondents that Dr. Hutchinson's research would be "of particular importance in possible future long-duration manned space flights." (A. 179). The Office of Naval Research (ONR) informed the Respondents that Dr. Hutchinson's research had "provided the Navy for the first time with an objective scientific testing system for measuring and examining aggressive behavior." (A. 178). Another agency assessed Dr. Hutchinson as a "highly competent, hard-

18. The Court of Appeals correctly noted that the Respondents "possessed" these agency reports (P. 82), but the Court's choice of terminology could leave the reader with the false impression that the Respondents merely had access to the reports and did not read them. Contrary to this implication, it is undisputed that the Respondents did, in fact, review these reports. Thus, Dr. Hutchinson does not contend that the Respondents failed to find the truth, but rather that they actually found the truth and chose to ignore it.

working and productive investigator," and noted that his experiments were "well designed and well executed." (A. 174).

In addition to reviewing these documents, Respondent Schwartz also had several telephone conversations with various agency officials who defended the Petitioner's work. Dr. Woodward of ONR, for example, described the research as "valid" and even Respondent Schwartz admitted that Dr. Stollnitz of the National Science Foundation told him that Dr. Hutchinson's research was "sound." (A. 184-85, 205-06, 209).

Nevertheless, in reckless disregard of these facts, the Respondents published their statements mischaracterizing and ridiculing Dr. Hutchinson's work as "nonsense" and "so-called research" which supposedly exhibited "transparent worthlessness."

At least as significant as the preceding ridicule and mischaracterization of Dr. Hutchinson's research are the specific misstatements of fact contained in the Respondents' publications. For example, the Respondents' press release charged that Dr. Hutchinson's projects may have been duplicative. In a specialized field of scientific research, many grant applications may involve similar or related studies, but to charge that a scientist has duplicated the same research under different grants is a serious allegation with grave civil and criminal implications. Consequently, this accusation by the Respondents dealt a serious blow to Dr. Hutchinson's professional reputation and his relationships with the agencies funding his various research projects. Despite the gravity of such a serious charge and the clear potential for harm to the Petitioner, the Respondents included it in their press release even though the only information in their possession which addressed the issue of possible duplication was a statement by Dr. Stollnitz of NSF that an agency study had compared Dr. Hutchinson's ONR and NSF projects and specifically found "no overlap." (A. 72-73).

Another factual misstatement contained in the Respondents' press release was the allegation that Dr. Hutchinson had received a personal fortune of $500,000 through his research activities. This statement must certainly raise a genuine issue of fact regarding the issue of malice in light of the Respondents' admissions that they knew this statement to be false. In his deposition, Proxmire admitted that he knew the federal funds in question had not been paid directly to Dr. Hutchinson, but had been granted to institutions. (A. 226). Proxmire further admitted actual knowledge that the institutions receiving the funds, and not Dr. Hutchinson, had the right to approve or disapprove of the ultimate expenditures under these grants. (A. 227). Likewise, Respondent Schwartz has also admitted that he knew, prior to the issuance of the press release, that the money in question actually went to various institutions, and not to Dr. Hutchinson. (A. 201, 211). In fact, Schwartz even knew the specific manner in which the grant money had been divided among salaries, overhead, equipment, and other items. (*Id.*).

Despite their admitted knowledge of these facts, the Respondents nevertheless issued a press release stating in part that:

> "All this money [$500,000] was given to Dr. Rolland (sic) R. Hutchinson of Kalamazoo State Hospital in Michigan."
>
> and
>
> "In fact, the good doctor has made a fortune from his monkeys, and in the process made a monkey out of the American taxpayer."

Since both of the Respondents have admitted actual knowledge that Dr. Hutchinson did not personally receive the research funds as they alleged, there should be little doubt that, at a minimum, a question of fact regarding the issue of malice has been presented for the jury. The Court of Appeals, however, failed to specifically address any of the preceding evidence. Instead, the court relied on the following observation:

> "[Defendants] possessed agency reports supporting [Dr. Hutchinson's] research and its cost. . . . In contrast, Defendants' exhibits include correspondence from agencies which criticize Plaintiff's research technique and project costs. (Defendants' Exhibit 90) At best, this could be read to show that there was a dispute as to the value of the research. This dispute by itself, however, is not sufficient to raise a question of material fact as to whether Defendants had knowledge that their statement of opinion regarding the value of the research was actually or probably 'false'." (P. 82).

The preceding observation by the Court of Appeals is both misleading and inaccurate. First of all, the court's statement is misleading because it purports to dispose of the entire malice issue, but considers only those statements ridiculing the value of Dr. Hutchinson's research, and fails to address the Respondents' charges of duplication and receipt of a personal fortune. Second, the lower court's statement is inaccurate because the record below does not include correspondence from agencies which criticized Dr. Hutchinson's research technique and project costs. The only part of the record cited by the court in support of this assertion was Defendants' Exhibit 90 which, contrary to the court's interpretation, was actually a letter from the National Institute of Mental Health (NIMH)

concerning a research *proposal* which was never funded and never became a part of Dr. Hutchinson's actual research. In fact, the agency concluded that "the quality of the proposal was far below that of [Dr. Hutchinson's] published work," and therefore implicitly supported the quality of Dr. Hutchinson's actual research.[19]

Thus, neither Defendants' Exhibit 90 nor any other defense exhibit supports the defamatory falsehoods contained in the Respondents' statements. On the contrary, all of the documents gathered and reviewed by Respondents during their investigation indicated the falsity of their subsequent allegations.[20] Certainly this evidence should raise a genuine issue of material fact as to whether the Respondents acted with a "high degree of awareness of . . . probable falsity." *St. Amant* v. *Thompson*, 390 US 727, 730-31 (1968); *Gertz* v. *Robert Welch, Inc., supra* at 342.

An additional point cited by the Court of Appeals was the fact that "Defendants even telephoned Dr. Hutchinson before the press release was issued to inform him of its content." (P. 82-83). The court fails to note, however, that after Schwartz read the proposed news release to Dr. Hutchinson, he was specifically advised that "the entire release is a travesty or mocking of the truth. It's a total distortion . . . from beginning to end it was a falsehood. . . ." (A. 247). Nevertheless, Respondents acted in reckless disregard of Dr. Hutchinson's warnings

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19. The rejection of this application also indicates that the existing process of administrative review provides an adequate mechanism for the screening of applications and assuring personal accountability for high-quality research.

20. As the lower court noted, "It is unchallenged that the Defendants spent many hours investigating and verifying their information. (Schwartz Affidavit ¶¶10-20)." (P. 82). Since all of the information revealed the falsity of the Respondents' statements, this awareness of the truth militates in favor of a finding of malice.

and proceeded to publish their press release. This conduct provides further evidence that the Respondents' press release was issued with actual malice.[21]

When the Respondents' disregard of Dr. Hutchinson's comments is coupled with their similar disregard of the facts they gathered from various government documents and agency officials, a fair inference may be drawn that the Respondents acted in reckless disregard of the truth. Moreover, when this reckless disregard is viewed in the context of the Respondents' established pattern of maliciously defaming social scientists by distorting and misrepresenting their work, the issue of fact regarding malice becomes even clearer. Finally, when all of the foregoing factors are added to the Respondents' admitted actual knowledge that at least some of their statements were incorrect, the existence of a genuine issue of fact regarding malice is undeniable. Consequently, the Petitioner is entitled to a trial on the merits.

CONCLUSION

In *Gertz* v. *Robert Welch, Inc., supra,* this Court emphasized the important social value in safeguarding the personal reputations of our nation's citizens:

> "The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood. We would not lightly require the State to abandon this purpose, for, as MR. JUSTICE STEWART has reminded us, the individual's right to the protection of his own good name
>
> > 'reflects no more than our basic concept of the essential dignity and worth of every human being —a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.' *Rosenblatt* v. *Baer,* 383 US 75, 92 (1966) (concurring opinion)."
>
> 418 US at 341.

The decision under review threatens to seriously abridge this legitimate state interest as well as the legitimate interests in the protection of privacy, lawful contractual relations and other civil rights. If the Court of Appeals' extension of Speech or Debate immunity is adopted by this Court, then political opponents and ordinary citizens alike would be powerless to protect themselves from personal attacks by members of Congress, no matter how false or malicious the defamatory statements might be. Similarly, the Court of Appeals' unduly expansive interpretation of *Gertz,* if allowed to stand, could signal an equally dangerous infringement on the civil rights of large numbers of private individuals previously protected under state law.

For these reasons, the Petitioner, Dr. Ronald R. Hutchinson, hereby respectfully prays that the decision of the United States Court of Appeals for the Seventh Circuit

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21. After mentioning the telephone call to Dr. Hutchinson, the court also stated that the Respondents could "point to their extensive researching of Dr. Hutchinson's applications for federal grants and contracts as support for their opinions regarding Plaintiff's 'grantsmanship.' (Defendants' Exhibit 82b, 83.)" (P. 83). Both of the Exhibits cited by the court, however, were compiled *after* this suit was commenced and thus are completely irrelevant to the malice issue. (See Proxmire's District Court Reply Brief, at pp. 3-4).

be reversed and remanded for further proceedings in accordance with the opinion of this Court.

Respectfully submitted,

MICHAEL E. CAVANAUGH
DAVID E.S. MARVIN
FRASER TREBILCOCK DAVIS & FOSTER
1018 Michigan National Tower
Lansing, Michigan 48933
Telephone 517-372-0235
Attorneys for Petitioner

Dated: March 7, 1979.

CERTIFICATE OF SERVICE

I, Michael E. Cavanaugh, one of the attorneys for the Petitioner herein, Dr. Ronald R. Hutchinson, hereby certify that all parties required to be served have been served with copies of the enclosed Brief for Petitioner and that such service was made in compliance with Supreme Court Rule 33 (1) upon each of the following attorneys for the Respondents: Mr. Bradway A. Liddle, Jr., Boardman, Suhr, Curry & Field, James Wilson Plaza, Suite 700, 131 West Wilson Street, P.O. Box 927, Madison, Wisconsin 53701, and Mr. Alan Raywid, Cole, Zylstra & Raywid, 2011 Eye Street, N.W., Washington, D.C. 20006, by depositing copies of the Brief for Petitioner in the United States post office with postage thereon fully prepaid.

/s/ MICHAEL E. CAVANAUGH

March 7, 1979